(28)

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et al.*
No. 121

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et al.*
No. 122

Verified Motion for Leave To Dispense With the Filing and Printing of Unnecessary Portions of Two Records Below on Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

James C. Jones
Lon O. Hocker
Frank Y. Gladney
Joseph H. Grand
Counsel for Petitioner

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

Index

Page

Motion to Dispense with Unnecessary Printing

Outline of the Case Below 2

The Facts Presently Material 3

The Rulings Below 4

The Questions Sought to be Reviewed 4

The Lengthy Record Below 6

The Record, for this Application, as Proposed by Petitioner 6

The Petitioner's Effort to Stipulate 7

Prayer 7

Verification 8

Cases Cited

Fiske, et al. v. Wallace and
Wallace v. Fiske, et al. (C. C. A. 8), 115 F. (2d) 1003.. 4, 6

Statutes Cited

Federal Rules of Civil Procedure

Rule 52 (b) 3, 5

Rule 59 (a, b & d) 5

Rule 60 5

Rule 62 (a) 5

Rule 73 (a) 3, 5

SUPREME COURT OF THE UNITED STATES

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S. Mayner Wallace
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Verified Motion for Leave To Dispense With the Filing and Printing of Unnecessary Portions of Two Records Below on Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

MAY IT PLEASE THE COURT:

Your petitioner, S. Mayner Wallace, a member of the Bar of this Court, also respectfully states that he is duly filing herewith in the clerk's office of this Court his typewritten Petition and supporting Brief for writs of certiorari, to the United States Circuit Court of Appeals for the eighth circuit, to review the orders of that court (under the FEDERAL RULES OF CIVIL PROCEDURE) dismissing (for want of jurisdiction) his certain cross-appeal and refusing to dis-

miss (and affirming) the main appeal, by the respondents hereto, in the following causes in that court:

Johanna F. Fiske, *et al.*, appellants, v. S. Mayner Wallace, No. 11,775 (main appeal)

and

S. Mayner Wallace, appellant, v. Johanna F. Fiske, *et al.*, No. 11,807 (cross-appeal)

Your petitioner further respectfully states that herewith he is also causing to be filed in the clerk's office of this Court a certified typewritten copy of all of the portions of the records of said causes believed by him possibly to be material for the review that is here sought; and, for *the reasons* below set forth herein, petitioner now respectfully moves to be allowed to have printed, and to proceed further herein upon, the said certified typewritten copy of the record.

Outline of the Case Below

In the litigation of "Ehrhardt W. Franz vs. Gustavus A. Buder, et al.," No. 6682, in the District Court of the United States for the eastern judicial district of Missouri, wherein there have been divers appeals to said Court of Appeals, the petitioner prayed for an assessment of counsel fees against the respondents (Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmermann, Otto B. Franz, Arthur U. Simmons, adm'r. c. t. a. of the estate of Gustav A. Franz, dec'd., Sherman H. Kleinschmidt and Helen Kleinschmidt) for compensation for legal services rendered to them in that litigation; and, after a trial in the District Court where much evidence was heard and judicial notice taken of all prior records in both Courts, a judgment for the petitioner was rendered.

From that judgment, both petitioner and the said respondents appealed to the Court of Appeals.

Petitioner moved to dismiss the appeal of respondents (upon the ground that the same, under the FEDERAL RULES OF CIVIL PROCEDURE, was prematurely taken within the first 10 days after the entry of a non-final judgment) but that motion was denied by the Court of Appeals—while petitioner's appeal to that Court was dismissed because not taken within 3 months from the date of judgment although same had been promptly taken after petitioner's timely motion, filed pursuant to the FEDERAL RULES OF CIVIL PROCEDURE, to modify that judgment, was denied in the trial court.

All of the Facts Presently Material

(The following record-references are, of course, to the said typewritten copy of the record now being filed with the clerk of this Court.)

Judgment for petitioner was entered in the District Court on March 30, 1940 (R. 8).

Within 10 days thereafter, on April 9, petitioner (asserting that the judgment was inadequate in amount) filed his motion (R. 10) to amend that judgment—pursuant to RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE.

2 hours and 5 minutes prior thereto (in the same day) respondents had filed in the clerk's office of the District Court their notice (R. 9) of appeal from that judgment—pursuant to RULE 73 (a).

Petitioner's said motion was entertained by the District Court; and argued, submitted and overruled there on July 25 following (R. 12).

Thereafter, on the 29th of July, petitioner filed his notice (R. 13) of appeal from said judgment—also pursuant to said RULE 73 (a).

The Court of Appeals denied (R. 21) petitioner's motion to dismiss said appeal (numbered 11,775 therein) of the respondents. That motion (R. 17) assigned that, under the RULES, that appeal was prematurely taken from a non-final judgment.

The Court of Appeals, at the same time, sustained (R. 20) a motion of the respondents to dismiss petitioner's said cross-appeal (numbered 11,807 therein). That motion (R. 14) assigned that that cross-appeal was not taken within the statutory 3 months from said March 30th, the date of judgment.

The Rulings Below

The opinion (R. 22) of the Court of Appeals (on those motions) proceeded upon the view that "the mere existence" of the right of a party, under the RULES, to move within 10 days against a judgment does not deprive the other party "of the right to take an appeal" at once upon the entry of judgment; and that respondents' appeal, having been taken immediately prior (although during the same day) to the filing of petitioner's motion to amend, was legally effective and, also, that the petitioner should then have gone to the Court of Appeals and moved for a remand for the consideration of his said motion. (*Fiske, et al. v. Wallace* and *Wallace v. Fiske, et al.*, 115 F.—2d—1003.)

So far as we are aware, this is the first time that any of the questions here presented, under the FEDERAL RULES OF CIVIL PROCEDURE, has been considered.

The Questions

now sought to be reviewed here involve the proper construction of certain of the FEDERAL RULES OF CIVIL PROCEDURE.

Those questions are:

I

May a party file notice of appeal and effectively appeal from a judgment of the District Court, under RULE 73 (a), within the 10 days after judgment during which time, under RULES 52 (b) and 59 (b), the other party has the statutory right to move to modify the judgment or to move for a new trial; or, is any such attempt to appeal premature as being from a judgment that is not final?

The April, 1937, Draft of those RULES provided [in RULE 59 (b) thereof] that the pendency of such a motion to modify "*does not affect the finality of the judgment or suspend its operation*"; but that provision *was stricken from* the RULES as finally adopted by this Court.

And present RULES 59 (a, b & d), 60 and 62 (a) also show that a judgment *stands in suspense* during the first 10 days after entry.

II

Is an appeal taken during the 10th day (and 2 hrs. & 5 min. before the filing, during the same day, of such a motion to modify) legally effective in view of the law's usual disregard for fractions of a day?

As above stated, the Court of Appeals has ruled that the "mere" right of a party to move, within 10 days, against a judgment does not prevent an adversary party from immediately filing notice of appeal upon the entry of a judgment; and, consequently, that that court had jurisdiction of respondents' said appeal but did not have jurisdiction of petitioner's said cross-appeal because the latter was taken more than 3 months after judgment although promptly after the overruling of petitioner's said motion to modify.

The Lengthy Record Below

The said facts required, for this review here, are in nowise controverted.

All of the said facts appear in the foregoing opinion (R. 22) of the Court of Appeals now reported in 115 F. (2d) 1003.

Additionally, all of said facts are exhibited by the portions of the said records in the Court of Appeals that are contained in said typewritten record now being filed here.

Said typewritten record (of 61 pages) will comprise less than 55 printed pages whereas the entire record, in the Court of Appeals, comprises said two transcripts therein, Nos. 11,775 and 11,807, containing an aggregate of 433 printed pages together with more than 1150 printed pages of Exhibits therewith, and, additionally, the transcripts, on 9 separate prior appeals to that court, containing more than 1500 printed pages.

Stated otherwise: Of more than 3,000 printed pages, only about 55 printed pages of the entire record below are in anywise relevant to the instant application for certiorari.

Petitioner further states that the cost of certifying and printing said entire record in the Court of Appeals would be prohibitive of this application and that such record, if filed here, would, with the exception of said approximate 50 printed pages thereof, be entirely useless to and burdensome upon this Court.

The Record, for This Application, As Proposed by Petitioner

Said typewritten and certified transcript, now being filed here, comprises the following:

From the District Court: the petition of petitioner upon which judgment was entered; the judgment; findings of fact and conclusions of law; respondents' notice of appeal, filed

at 2:05 P. M., and petitioner's motion (for amendment of the judgment) filed at 4:10 P. M. on the same day; order overruling said motion; and petitioner's notice of appeal.

From the Court of Appeals: respondents' motion to dismiss petitioner's cross-appeal; petitioner's motion to dismiss respondents' appeal; orders dismissing petitioner's cross-appeal and denying motion to dismiss respondents' appeal; opinion on said motions; petition for rehearing; order denying petition for rehearing; order of submission of respondents' appeal; judgment of affirmance on respondents' appeal; opinion; petition for rehearing; and order denying said petition for rehearing.

Petitioner's Effort to Stipulate

Petitioner has proposed to G. A. Buder, Jr., Esq., and Jesse T. Friday, Esq., both of the St. Louis, Missouri, Bar, counsel for all of the respondents, that the parties stipulate the last above specified portions of the record (being the same matter now contained in said typewritten copy now being filed here) as the record to accompany this the petitioner's application for certiorari; but, after correspondence and consideration, said counsel, on May 19, 1941, refused to stipulate the said or any other record.

Said typewritten and certified copy of the record now being filed here, while requested by petitioner of the clerk of the Court of Appeals at once upon the said counsel's refusal to stipulate, was not furnished to petitioner until May 28, 1941.

Prayer

Wherefore, your petitioner respectfully moves and prays to be allowed to have printed, and to proceed further herein upon, his said typewritten Petition and supporting Brief, for writs of certiorari, and upon the said certified typewritten record (comprising the matter, from said transcripts Nos. 11,775 and 11,807, in the Court of Appeals, and

specified above under the title of "*The Record, for this Application, as Proposed by Petitioner*") now being filed with the clerk of this Honorable Court; and your petitioner will ever pray, *etc.*

Respectfully submitted

S. MAYNER WALLACE
Petitioner and Movant

By JAMES C. JONES
LON O. HOCKER
FRANK Y. GLADNEY
JOSEPH H. GRAND
Counsel for Petitioner

St. Louis, Mo.
May, 1941

Verification

United States of America
Eastern Judicial District of Missouri } *ss:*
The City of St. Louis

The Affiant, S. Mayner Wallace, petitioner and movant in the foregoing MOTION, being duly sworn, upon his oath states that the facts therein stated are true and that the matters and things, therein stated upon information and belief, he believes to be true.

S. MAYNER WALLACE
Affiant

Subscribed and sworn to before me this 29th day of May, A. D. 1941.

My commission expires on August 25, 1944.

Notarial Seal

A. M. MENZI
Notary Public within and for The City of
St. Louis, State of Missouri

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 122

Petitioner's Petition for Rehearing or Reconsideration of the Denial of Certiorari as Being Out of Time

(Containing, as an APPENDIX hereto, a printed copy of petitioner's typewritten Petition and Brief for Certiorari docketed with petitioner's verified printed Motion for leave to dispense with the printing of unnecessary portions of the record below)

on

Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

Index

	Page
Argument	5
Certificate	9
Facts Involved	3
Grounds for Rehearing	4
Prayer	8
Statement	1

Case Cited

Montana Min. Co. v. St. Louis Min. & Mill. Co. and Montana Min. Co. v. St. Louis Min. & Mill. Co., 186 U. S. 24, 30-32 ..... 4, 5, 6

SUPREME COURT OF THE UNITED STATES

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S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 122

Petitioner's Petition for Rehearing or Reconsideration of the Denial of Certiorari as Being Out of Time

on

Petition for (Two) Writs of Certiorari
to the
United States Circuit Court of Appeals (Eighth Circuit)

MAY IT PLEASE THE COURT:

Petitioner, S. Mayner Wallace, respectfully petitions, upon the grounds below specified, for a rehearing or a reconsideration of the orders, in the above entitled causes, denying his Petition for Certiorari upon the view that the application therefor was not made within the three months limited by 28 U. S. C. sec. 350.

That Petition presented the question (apparently of first impression) whether, under the FEDERAL RULES OF CIVIL PROCEDURE, a party may effectually give notice of appeal from a District Court to a Circuit Court of Appeals within the first 10 days after judgment during which time an adversary party is now accorded the right, by those RULES, to move to amend the judgment or to move for a new trial. Stated otherwise, is any such appeal premature as being from a non-final judgment?

In the above entitled causes, petitioner, on June 2, 1941, docketed here a (typewritten) Petition and Brief for Certiorari and filed therewith his verified (printed) Motion for leave to dispense with the printing of unnecessary portions of the record below; and orders denying the two writs for which petitioner prayed (To Review Orders of the Court of Appeals Dismissing a Cross Appeal and Refusing to Dismiss the Main Appeal in One Case Then Under Review in That Court) were entered here on October 20, 1941, as follows:

> "In No. 122, the petition for writ of certiorari to review the judgment entered November 16, 1940, rehearing denied November 27, 1940, is denied on the ground that it was not filed within the time provided by law. 28 U. S. C. sec. 350.
>
> "In No. 121, the motion for leave to dispense with the filing and printing of unnecessary portions of the record is denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied."

For the Court's convenience, that (typewritten) Petition and Brief for Certiorari are now printed as an attached Appendix.

The *only question* involved here is whether the time for certiorari ran from November, 1940, or from March 5, 1941, when the Court of Appeals judgment became final.

It is respectfully submitted that this Court seems inadvertently to have assumed that there were two separately reviewable rulings (one, the order dismissing the cross appeal and the other, the order refusing to dismiss the main appeal, in the same case, on Nov. 16, 1940) in the Court of Appeals—whereas, it is also respectfully submitted, there was only one reviewable judgment below (on

Jan. 31, 1941, rehearing denied Mar. 5, 1941) wherein all prior rulings, in the Court of Appeals, then became final, for the first time, and that, therefore, this application for certiorari is not out of time.

The Facts

(As shown by the short certified typewritten record on file here and upon which petitioner has moved for leave to proceed)

The Court of Appeals, on November 16, 1940, denied petitioner's motion to dismiss the main appeal by the respondents and sustained a motion by the respondents to dismiss petitioner's cross appeal in the same case; and, on November 27th following, denied a petition for a rehearing of those rulings (R. 20, 21).

That Court, on December 6, 1940, proceeded to hear said main appeal and, on January 31, 1941, affirmed the judgment from which the parties had thus appealed and, thereafter, a timely petition for rehearing was denied by the Court of Appeals on March 5, 1941 (R. 57).

This application for certiorari, to review said orders of November 16th, was, as stated, docketed here on June 2, 1941—or within the three months after said March 5th.

As demonstrating the interdependence and essential oneness of said orders of November 16th, these further facts should be pointed out:

The appealed judgment of the District Court was entered there March 30, 1940 (R. 8).

On April 9th, within 10 days thereafter, the respondents herein filed in the clerk's office of the trial court a notice of their (the said main) appeal; and 2 hrs. and 5 min. thereafter, on said April 9th, petitioner (pursuant to the

FEDERAL RULES OF CIVIL PROCEDURE) filed therein his motion to modify that judgment (R. 9, 10).

On July 25th following, that motion to modify was entertained and overruled by the District Court; and, on July 29th thereafter, petitioner gave notice of his said cross appeal from said judgment (R. 12, 13).

Those appeals, having been taken more than three months apart, could not both possibly be good. *A determination that one was good automatically determined that the other was not.*

This Court, in denying the writs prayed for, evidently assumed that the said order of November 16th, dismissing petitioner's cross appeal, was final and reviewable here notwithstanding the fact that the Court of Appeals continued the exercise of its jurisdiction over the case and, at any time up to said March 5th, might have and could have changed its view of which of the said appeals should be dismissed. All rulings of that Court were made during its November 1940 Term.

The Grounds

of this Petition for Rehearing or Reconsideration are that the orders, denying certiorari, are:

(1) Contrary to principles enunciated in the Opinion in *Montana Min. Co. v. St. Louis Min. & Mill. Co.* and *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 186 U. S. 24; and are

(2) Not in accord with other determinative factors also immediately below pointed out.

ARGUMENT

From the facts aforesaid, it is respectfully submitted that neither of the said two orders of November 16, 1940, in the Court of Appeals, was final or reviewable here before March 5, 1941; and that, in the light of those facts, this Court's Opinion, in Montana Min. Co. v. St. Louis Min. & Mill Co. and Same v. Same, 186 U. S. 24, 30-32, urges the reconsideration for which the petitioner is praying

Obviously, the order of the Court of Appeals, refusing to dismiss the main appeal, was not reviewable here until after that Court had proceeded to its final judgment.

And this Court would not have reviewed the other order (dismissing the cross appeal) in that Court in the absence of an application for the review here of that first mentioned order also; for each order was part of one entire ruling.

Those two orders were *completely complementary* because both of the two appeals (having been taken more than three months apart) could not possibly be valid—for the sustension of either one *necessarily* meant the dismissal of the other.

The Court of Appeals would, of course, have been in error in thereafter affirming the judgment as that Court did (rather than to have dismissed the main appeal) had this Court, in the meanwhile, reversed that Court's ruling on the validity of said cross appeal.

Suppose—if your Honors please—the Court of Appeals had finally reversed (rather than affirmed) said judgment and that, in the meantime, this Court had reversed that Court's ruling on the validity of said cross appeal? The

Court of Appeals would then have been required to determine an appeal from a judgment that that Court had already reversed.

In other words, it is respectfully contended that:

1. There was only one case, in the Court of Appeals, wherein there were two appeals from the same judgment of the District Court. (Possibly, some confusion has arisen because of the fact that, in the Court of Appeals, while there was—except for the cross appeal papers—only one record, the main and the cross appeal were each separately numbered.)

2. No proceeding to review that case could properly have been in this Court and in the Court of Appeals at the same time.

3. The said orders of November 16th, in the Court of Appeals, were both interlocutory until final judgment by that Court at which time that Court—certainly during the same Term—could have completely changed its view concerning the validity of both of the said appeals.

4. Any determination of the validity of said main appeal **automatically** determines the validity of said cross appeal—and *vice versa.*

It is also respectfully submitted that the soundness of the foregoing argument is conclusively demonstrated by *Montana Min. Co. v. St. Louis Min. & Mill. Co.* and *Same v. Same*, 186 U. S. 24, 30-32, where the Montana Company sued out two writs of error (Nos. 213 and 214) to review two rulings, some 5 months apart, in the same case, in a Court of Appeals.

The first of those rulings was an affirmance (on the main appeal) and the other a reversal and remand (on a cross appeal) of parts of the same judgment of a trial court.

This Court held that, in those circumstances, neither one of said rulings was final; and your Honors, in dismissing both writs of error because of the want of finality in each, observed that "part of the case" could not properly pend in this Court and in a court below at the same time and said:

> "We do not mean to intimate in the slightest degree any conclusion on the merits, but only wish to indicate embarrassments which might arise if one and the same case is treated as two separate and independent cases. (p. 31)
>
> * * *
>
> "In this case two writs of error were sued out by the Montana Company because there were two judgments rendered below, but the records on both constitute the record in one and the same case, as both writs of error in the Court of Appeals ran to the same judgment of the circuit court. (p. 31)
>
> * * *
>
> "But we are of opinion that the judgment of the Court of Appeals on the writ of error prosecuted by the St. Louis Company operated to reverse the prior judgment of affirmance, inasmuch as the Court in terms reversed the judgment of the circuit court, although imposing a limitation on the extent of the new trial awarded. Even if the Court of Appeals had power to impose that limitation, the issue so reserved deprived the first judgment of finality so far as our jurisdiction is concerned. (p. 32)
>
> * * *
>
> "Each party was defeated in some part of its contention, and each party took the case to the Court of Appeals, but the decision of that Court left a part of the case undisposed of in the court below. The judgment of reversal being before us in No. 214, we are not compelled to ignore its effect on the judgment in No. 213, and to enter-

tain one writ of error while dismissing the other. (p. 32)

* * *

"When these writs of error were taken out the judgment first rendered had ceased to be final by the operation of the second judgment, which was itself not final, and the result is that both must be dismissed." (p. 32)

In other words, if, in the instant case, the Court of Appeals, on January 31, 1941, had reversed and remanded, this Court would then have denied certiorari to review the dismissal, on November 16, 1940, of the cross appeal because of the want of finality in everything that had then been done in that Court; while the fact that the Court of Appeals affirmed cannot, of course, change the prior non-finality of the order of that Court dismissing said cross appeal.

Other cases, in this Court, to the general effect that the said orders dismissing the cross appeal and refusing to dismiss the main appeal were interlocutory and not final, appear on pages 6 and 10 of the said APPENDIX hereto.

WHEREFORE, for the reasons aforesaid, the petitioner earnestly prays for a rehearing or a reconsideration of the orders of this Court denying certiorari as being out of time and that the writs applied for be granted; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. MAYNER WALLACE
Petitioner
Pro Se

October, 1941

Certificate

The undersigned, S. Mayner Wallace, the above named petitioner, a member of the bar of this Court, hereby certifies that, in his opinion, the foregoing Petition is well founded; that same is not interposed for delay, but is presented and filed in good faith because he believes that the same ought to be granted and that a grave injustice will result to the said petitioner if this Petition is denied.

S. Mayner Wallace
Petitioner
Pro Se

APPENDIX

The following are printed copies of petitioner's typewritten Petition and Brief for Certiorari (with printed page references added to the Index thereto) docketed here June 2, 1941, with petitioner's verified and printed Motion for leave to dispense with the filing and printing of unnecessary portions of the record below.

Record references, in the following, are, of course, to the pages of the certified typewritten copy of the record now on file here.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace
Petitioner
vs. No. .....

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S. Mayner Wallace
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Petition for (Two) Writs of Certiorari
to the
United States Circuit Court of Appeals
(Eighth Circuit)
and
Brief in Support

JAMES C. JONES
LON O. HOCKER
FRANK Y. GLADNEY
JOSEPH H. GRAND
Counsel for Petitioner

Subject Index

Page

Petition for Writs of Certiorari..... 1–8

Summary and Short Statement of the Matter Involved 1

Jurisdictional Statement 4

The Questions Presented 6

Reasons Relied On For Allowance of the Writ..... 6

Prayer for Writs 7

Brief in Support of Petition for Writs of Certiorari..9–18

A. The Opinions of the Court Below..... 9

B. Jurisdiction 9

C. Statement of the Case..... 9

D. Specification of Errors 9

E. Argument 11

I. The Court of Appeals Was in Error in Ruling That, Under the Federal Rules of Civil Procedure, an Appeal to It from the District Court May Validly Be Taken at any Time During the 10-Day Period Following Judgment Within Which Period Another Party Has the Right to Move to Amend the Judgment or to Move for a New Trial..... 11

II. If the View That Fractions of a Day Are Not Ordinarily Regarded by the Law Be Applied, It Automatically Follows That the Court of Appeals Dismissed the Wrong Appeal 15

Conclusion 18

Table of Cases Cited

Burnet v. Willingham L. & T. Co., 282 U. S. 437, 440.. 16

Chicago, G. W. R. R. Co. v. Basham, 249 U. S. 164, 167 10

Cox v. Frank L. Schaab S. & F. Co., 332 Mo. 492, 497, 58 S. W. (2d) 700, 701..... 14

Empire Lighting Fixture Co. v. Practical Lighting Fixture Co. (C. C. A. 2), 20 F. (2d) 295, 297 (1st. col.) 16

Ex parte Railroad Co., 95 U. S. 221, 225..... 10

Gypsy Oil Co. v. Escoe, 275 U. S. 498..... 4

Holland v. Marshall (Mo. Ap.), 181 S. W. 124..... 14

John Simmons Co. v. Grier Bros., 258 U. S. 82, 91.... 6

Lee's Summit B. & L. Ass'n. v. Cross, 345 Mo. 501, 507, 134 S. W. (2d) 19, 22 (2d. col.)..... 14

McLish v. Roff, 141 U. S. 661, 667-8..... 10

Mountain Min. Co. v. St. Louis Min. & Mill Co. and Mountain Min. Co. v. St. Louis Min. & Mill Co., 186 U. S. 24 5

Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522.. 10

Rogers v. Hill, 289 U. S. 582, 586-7..... 10

Sandy MacGregor Co. v. Vaco Grip Co. (C. C. A. 6), 2 F. (2d) 655, 656 (2d. col.) 16

Winters v. Ethell, 132 U. S. 207, 210..... 10

Table of Statutes Cited

Federal Rules of Civil Procedure

Rule 6 (a) 16

Rule 52 (b) 2, 6, 11

Rule 59 (a, b & d) 6, 7, 11, 12, 13

Rule 60 ..... 7, 13

Rule 62 (a) 7, 14

Rule 73 (a) 2, 11

R. S., sec. 1008, as am'd. by sec. 8 (a) of the Act of Feb. 13, 1925 (28 USCA sec. 350) 4

Sec. 240 (a) Judicial Code, as am'd. by Act of Feb. 13, 1925 (28 USCA sec. 347) 4

Textbooks Cited

Black's Law Dictionary 16
Blackstone's Commentaries, vol. 2, p. 141 16

Moore's Federal Practice, Vol. 3, p. 3120 12

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

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S. Mayner Wallace

Petitioner

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Johanna F. Fiske, *et al.*

Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

May it please the Court:

The petition of S. Mayner Wallace respectfully shows to this Honorable Court that:

A judgment, in the Court of Appeals, dismissing a cross-appeal (for want of jurisdiction) and refusing to dismiss (and affirming) the main appeal, is here submitted for review.

Summary and Short Statement of the Matter Involved

This application deals with the effect of the FEDERAL RULES OF CIVIL PROCEDURE on a party's right to appeal from the District Court to the Circuit Court of Appeals within the 10-day period after judgment during which time, by those RULES, a motion to amend the judgment or a motion for a new trial may be made by such a party's adversary.

(Filed herewith is petitioner's MOTION for leave to dispense with the printing of unnecessary parts of a lengthy record in the Court of Appeals.)

The facts are:

Petitioner, S. Mayner Wallace, sued respondents (Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmermann, Otto B. Franz, Arthur U. Simmons, Adm'r. c. t. a. of the estate of Gustav A. Franz, dec'd., Sherman H. Kleinschmidt and Helen Kleinschmidt) in the District Court for the Eastern Judicial District of Missouri, to recover compensation for certain legal services.

Judgment for petitioner was entered on March 30, 1940 (R. 8).

Within 10 days thereafter, on April 9, petitioner (asserting the judgment was inadequate in amount) filed his motion (R. 10) to amend that judgment—pursuant to RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE.

Two hours and 5 minutes prior thereto (in the same day) respondents had filed, in the clerk's office of the District Court, their notice (R. 9) of appeal from that judgment—pursuant to RULE 73 (a).

Petitioner's said motion was entertained by the District Court; and argued, submitted and overruled there on July 25th following (R. 12).

Thereupon, on the 29th of July, petitioner filed his notice (R. 13) of appeal from said judgment—also pursuant to said RULE 73 (a).

The Court of Appeals denied (R. 21) petitioner's motion to dismiss said appeal (numbered 11,775 therein) of the respondents. The motion (R. 17) assigned that, under the RULES, that appeal was prematurely taken from a non-final judgment.

The Court of Appeals, at the same time, sustained (R. 20) a motion of the respondents to dismiss petitioner's said cross-appeal (numbered 11,807 therein). That motion (R. 14) assigned that that cross-appeal was not taken within the statutory 3 months from said March 30th, the date of judgment.

The opinion (R. 22) of the Court of Appeals (on those motions) proceeded upon the view that "the mere existence" of the right of a party, under the RULES, to move, within 10 days, against a judgment, does not deprive the other party "of the right to take an appeal" immediately upon the entry of judgment; and that respondents' appeal, having been taken 2 hrs. & 5 min. prior to the filing of petitioner's motion to amend, was good, and, also, that the petitioner should then have gone to the Court of Appeals and moved for a remand for the consideration of his said motion to modify the judgment.

Thereupon, during the same (November) term, the Court of Appeals proceeded to a hearing of respondents' said appeal upon the merits; and affirmed (R. 48) the said judgment.

Petitioner's contention is that the Court of Appeals dismissed the wrong appeal; that that Court had no jurisdiction of respondents' said appeal and should have dismissed the same; and that that Court should now be directed to hear petitioner's said cross-appeal.

That contention is bottomed upon the FEDERAL RULES OF CIVIL PROCEDURE providing a 10-day period, after judgment, for moving against the judgment; but it will be observed that the same result should follow if the law's traditional disregard for fractions of a day be applied because, in that event, it results that respondents' said notice of appeal never possessed any legal significance.

Jurisdictional Statement

The opinion of the Court of Appeals, on the motions to dismiss the appeal and cross-appeal, is reported in 115 F. (2d) 1003, while the opinion of that Court, affirming the judgment of the District Court, is reported in 117 F. (2d) 149.

A petition for rehearing, following the said judgment of affirmance on January 31, 1941, by the Court of Appeals, was denied on March 5, 1941 (R. 57).

The statutory provisions, believed to sustain the jurisdiction of this Court, are: section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938 (28 USCA sec. 347) providing for review by certiorari, and Revised Statutes, section 1008, as amended by section 8 (a) of the Act of February 13, 1925, 43 Stats. 940 (28 USCA sec. 350) requiring that an application for certiorari be duly made "within three months after the entry" of judgment; and it is held (*Gypsy Oil Co. v. Escoe*, 275 U. S. 498) that that time runs from the denial of a seasonably filed and entertained petition for rehearing.

While such motions, as those below, are frequently reserved and ruled upon when the whole case is decided, yet it is respectfully submitted that the fact that the motion to dismiss petitioner's cross-appeal was sustained and the motion to dismiss respondents' appeal was denied by the Court of Appeals on November 16, 1940 (R. 20 & 21) is of no consequence in relation to the present jurisdiction of this Court. In other words, the orders, on those motions, did not become final, for review on certiorari, until said March 5, 1941.

The refusal of the Court of Appeals to dismiss the respondents' appeal could not have been reviewed here until after said March 5; and the same is therefore necessarily

true of that Court's dismissal of the petitioner's cross-appeal.

A case, sustaining the jurisdiction of this Court respecting said cross-appeal, in such circumstances, is:

Mountain Min. Co. v. St. Louis Min. & Mill. Co. and *Mountain Min. Co. v. St. Louis Min. & Mill. Co.*, 186 U. S. 24

The two said appeals to the Court of Appeals below, having been taken more than 3 months apart, could not both be good. A determination that either one was good necessarily meant that the other one was not.

So long as the Court of Appeals retained jurisdiction and considered the merits, that Court could, of course, have changed its view of the validity of those two appeals; and, on said March 5, a change of view by that Court of the validity of respondents' said appeal would automatically have resulted in a change of view with respect to the validity of petitioner's said cross-appeal.

All of the rulings of the Court of Appeals acquired the element of finality during its November, 1940, Term.

The order, on said November 16, sustaining respondents' motion to dismiss petitioner's said cross-appeal was interlocutory and, for that and the other reasons herein advanced, was not reviewable sooner here.

Moreover, had this Court granted a certiorari to review the validity of petitioner's said cross-appeal, immediately after said November 16, a review of the same judgment would then have been pending here and, also, in the Court of Appeals at the same time. That, of course, is not admissible.

The want of finality, in the order dismissing petitioner's cross-appeal, would have made an application for certiorari, prior to said March 5, to review that order, subject

to denial; while the failure of the petitioner sooner to apply here for a review of that interlocutory order was not laches (*John Simmons Co. v. Grier Bros.*, 258 U. S. 82, 91).

(Additional authorities are cited, *infra*, in the annexed Brief.)

The Questions Presented

The questions presented by this application for certiorari are:

I

May an appeal validly be taken by a party to a Circuit Court of Appeals from a judgment of a District Court within the 10-day period after judgment, during which period the adversary party is accorded the right, under RULES 52 (b) and 59 (b) of the FEDERAL RULES OF CIVIL PROCEDURE, to move to amend the judgment or to move for a new trial?

In other words, is any such attempted appeal premature as being from a non-final judgment?

II

Regardless of the answer to the foregoing, is such an appeal, taken during the 10th day after judgment, but 2 hrs. & 5 min. before the filing during that day by the adversary party of such a motion to amend, valid in the light of the law's usual disregard for fractions of a day?

Reasons Relied On For Allowance of the Writ

I

The terms of RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE, read in the light of its legislative history, demonstrate, *conclusively and expressly*, that the said judgment of the District Court did not become final (and was,

therefore, non-appealable) during the 10-day period immediately following its entry.

RULES 59 (a & b), 59 (d), 60 and 62 (a), as finally adopted, all point to the same end.

(The foregoing is briefed in the annexed Brief.)

The opinion (R. 22) of the Court of Appeals, now also reported in 115 F. (2d) 1003, holding that such a judgment, for appeal purposes, nevertheless became final immediately upon its entry, represents, so far as we are aware, the only judicial consideration that this subject-matter has so far received; and, therefore, it is respectfully submitted that, within the language of RULE 38 (5-b) of this Court, the Court of Appeals has "decided an important question of Federal law which has not been, but should be, settled by this Court."

II

The ordinary disregard of the law for fractions of a day required, in and of itself, in said circumstances, the invalidation of respondents' appeal and, thereby, the automatic validation of petitioner's cross-appeal.

(This matter is also briefed in the annexed Brief.)

Prayer

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the eighth circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings (or such parts thereof as may be permitted by this Court pursuant to petitioner's certain MOTION, filed

with this Petition, to dispense with unnecessary printing) in the cases numbered and entitled (on the docket of said Court of Appeals) 11,775—"Johanna F. Fiske, *et al.*, appellants, vs. S. Mayner Wallace" and 11,807—"S. Mayner Wallace, appellant, vs. Johanna F. Fiske, *et al.*"; and that the judgment of said Circuit Court of Appeals refusing to dismiss said appeal No. 11,775 and the judgment of said Court of Appeals dismissing said cross-appeal No. 11,807 be reversed by this Honorable Court and that said Court of Appeals be directed to dismiss said appeal No. 11,775 and to hear and decide said appeal No. 11,807 upon the merits thereof and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

S. Mayner Wallace
Petitioner

by
James C. Jones
Lon O. Hocker
Frank Y. Gladney
Joseph H. Grand
Counsel for Petitioner

St. Louis, Mo.
May, 1941

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace

Petitioner

vs.

Johanna F. Fiske, *et al.*

S. Mayner Wallace

Petitioner

vs.

Johanna F. Fiske, *et al.*

Brief in Support of Petition for Writs of Certiorari

A

The Opinions of the Court Below

The opinion (R. 22) of the Court of Appeals, refusing to dismiss respondents' appeal and dismissing petitioner's cross-appeal, is reported as Fiske, *et al.* v. Wallace and Wallace v. Fiske, *et al.*, 115 F. (2d) 1003.

The opinion (R. 42) of the Court of Appeals, affirming the judgment on respondents' (or the main) appeal, is reported as Fiske, *et al.* v. Wallace, 117 F. (2d) 149.

B

Jurisdiction

A full statement, concerning the jurisdiction, appears in the annexed Petition under the title "Jurisdictional Statement" and the same, and the authorities there cited, are not, in the interest of brevity, here repeated.

The following additional cases, however, also sustain the principle for which petitioner contends in his argument to the effect that the order of the Court of Appeals, dis-

missing his said cross-appeal, was not final or reviewable here while the respondents' (or the main) appeal was pending below in the Court of Appeals:

Winters v. Ethell, 132 U. S. 207, 210
McLish v. Roff, 141 U. S. 661, 667-8
Ex parte Railroad Co., 95 U. S. 221, 225
Rogers v. Hill, 289 U. S. 582, 586-7
Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522
Chicago, G. W. R. R. Co. v. Basham, 249 U. S. 164, 167

C

Statement of the Case

A full statement of the case appears under the title "Summary and Short Statement of the Matter Involved" in the annexed Petition and, in the interest of brevity, is not now repeated.

D

Specification of Errors

1. The Court of Appeals erred in dismissing petitioner's cross-appeal (upon the ground that same was not taken within 3 months after the date of the judgment in the District Court notwithstanding the pendency there of petitioner's motion to amend that judgment); and

2. The Court of Appeals erred in refusing to dismiss for want of jurisdiction (upon the ground that same was prematurely taken from a non-final judgment in the District Court) the said main appeal of the respondents; and

3. The Court of Appeals also erred, in each of the foregoing particulars, because of its failure to accord legal significance to the fact that the law ordinarily disregards fractions of a day—a principle which, if applied, would have automatically resulted in sustaining petitioner's said cross-appeal and in dismissing respondents' said main appeal.

E

Argument

I

The Court of Appeals Was in Error in Ruling That, Under the Federal Rules of Civil Procedure, an Appeal to It from the District Court May Validly Be Taken at any Time During the 10-Day Period Following Judgment Within Which Period Another Party Has the Right to Move to Amend the Judgment or to Move for a New Trial

Prior to the adoption of the FEDERAL RULES OF CIVIL PROCEDURE, there was, of course, no statutory time limit for moving against a judgment; and, furthermore, an appeal was required to be allowed by the judge of the trial court and that fact operated as a check on the taking of a too hasty appeal.

Now, however, under RULE 73 (a), such an appeal is taken merely by the filing of a notice in the clerk's office.

RULE 52 (b), under which petitioner moved in the trial court, reads:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59. * * *".

That RULE, in the April, 1937, Draft—the Draft immediately preceding the one that was finally adopted by this Court—was numbered 59 (b) and read:

> "Upon motion of a party made within 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. *The pendency*

*of the motion does not affect the finality of the judgment or suspend its operation; * * *.''* (*Italics* ours.)

That last sentence was stricken by this Court from the present RULES; and, as is said in MOORE'S FEDERAL PRACTICE, Volume 3, page 3120:

> "This provision was stricken on the theory that the motion should have such an effect."

In other words, the pendency of such a motion does affect the finality of a judgment and does suspend its operation and, necessarily, makes premature any attempt to appeal therefrom while the judgment is thus non-final.

The foregoing legislative history would seem to be conclusive of the error of the Court of Appeals in its contrary view; for, if the finality of the judgment be suspended by such a motion filed within 10 days, that judgment is necessarily non-final prior thereto.

Other provisions of the present RULES also contemplate that such a judgment does not become final during the 10-day period following its entry.

RULE 59:

> (a) "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of

law or make new findings and conclusions, and direct the entry of a new judgment."

(b) "A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

(Seemingly, in the case of a motion bottomed upon newly discovered evidence, while the judgment becomes final 10 days after its entry, yet, thereafter, a non-final character may be restored to it by the prescribed procedure).

RULE 59 (d) provides:

"Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

(Under the opinion of Court of Appeals, in the event of a quick notice of appeal the trial court stands deprived of that power.)

Under RULE 60, providing for "Relief from Judgment or Order", the court, upon a motion made "within a reasonable time", during six months, may, for mistake, etc., grant relief against a default judgment—but that RULE also provides:

"A motion under this subdivision does not affect the finality of a judgment or suspend its operation."

(Contrasted with other provisions, the last quoted provision is highly significant.)

RULE 62 (a) reads:

> "Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. * * *".

Therefore, under the present RULES, a judgment, during the 10-day period, stands in suspense and any attempted appeal therefrom, during that time, is premature.

We have been unable to find that this question, here presented, has been considered in the Federal forum in any case other than this one; but the principle involved would appear to be exactly the same under identical provisions of State legislation.

In Missouri, a motion for new trial is required to be filed within 4 days after judgment; and it has long been firmly settled in that State that, during said statutory period, a judgment is interlocutory and is not appealable:

> Cox v. Frank L. Schaab S. & F. Co., 332 Mo. 492, 497, 58 S. W. (2d) 700, 701
> Lee's Summit B. & L. Ass'n. v. Cross, 345 Mo. 501, 507, 134 S. W. (2d) 19, 22 (2d col.)
> Holland v. Marshall (Mo. App.), 181 S. W. 124

The FEDERAL RULES OF CIVIL PROCEDURE have, as we understand, all the force of legislation and are to be given the same effect as if the RULES had been enacted directly by the Congress; and, as the RULES are later than any Act of Congress governing appeals, the latter, in so far as there might be any conflict, stands amended by the RULES.

The ruling of the Court of Appeals necessarily means that any party litigant, by immediately filing notice of appeal, can nullify, to a very material extent, the effectiveness and operation of the RULES; for it would seem to be without the spirit as well as the letter of the RULES to allow any party, effectively, to give notice of appeal, in any or every

case, immediately after the entry of judgment and thereby prevent all reconsideration in the trial court.

The view (R. 26) of the Court of Appeals is that the remedy of the other party, in event he desires the trial court to reconsider something, is first to go to the Court of Appeals and secure a remand for that purpose.

It is respectfully submitted that that cannot be the intent of the RULES. That course invites delays, useless work in the Appellate Court, is cumbersome and seems otherwise wholly inadmissible. The RULES, instead of simplifying procedure, would, in such case, complicate procedure.

It is also respectfully submitted that the two cases cited (R. 25) by the Court of Appeals (from the Court of Appeals for the seventh and fourth circuits) do not tend to support the view that such a judgment, as entered in the trial court, was appealable during said 10-day period, because those Courts considered no such question as we now have here.

II

If the View That Fractions of a Day Are Not Ordinarily Regarded by the Law Be Applied, It Automatically Follows That the Court of Appeals Dismissed the Wrong Appeal

We also respectfully submit that a sound (independent) view is that, because of the law's disregard, ordinarily, for fractions of a day, the filing of petitioner's motion to amend and the filing of the notice of appeal by the respondents, in the District Court, should, legally and practically, be viewed as simultaneous acts. (Same were, as already shown, filed just 2 hours and 5 minutes apart.)

If so, that notice of appeal meant nothing and has never possessed legal significance.

Fractionem diei non recipit lex—"The law does not take notice of a portion of a day". Black's Law Dictionary; and see Blackstone's Commentaries, vol. 2, p. 141.

This Court has observed—by MR. JUSTICE HOLMES:

> "The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time."
>
> Burnet v. Willingham L. & T. Co., 282 U. S. 437, 440

Some agreement with the common law rule is now indicated by the FEDERAL RULES OF CIVIL PROCEDURE themselves where, in RULE 6 (a), it is provided that:

> "A half holiday shall be considered as other days and not as a holiday."

Among the cases, dealing with the above referred to rule of the common law and supportive of our position, are:

Sandy MacGregor Co. v. Vaco Grip Co. (C. C. A. 6), 2 F. (2d) 655, 656 (2d. col.)

Empire Lighting Fixture Co. v. Practical Lighting Fixture Co. (C. C. A. 2), 20 F. (2d) 295, 297 (1st. col.)

Suppose counsel for the petitioner and counsel for the respondents had appeared, on April 9, in the clerk's office, at the same time and that (instead of the time differential of 2 hours and 5 minutes) a dispute had arisen over which one filed his paper first? Isn't it true that no court, in such a situation, would hesitate a moment in ruling that that notice of appeal was nil? Then, why should the 2 hours and 5 minutes make any difference—or any period of time less than 1 day?

The time element here could just as well have been 5 seconds. Where (if a fraction of a day is to be considered)

would the Court, in cases like this, draw a line—so to speak?

It should be borne in mind that there was no reason whatsoever why respondents should have filed their notice of appeal on April 9 and, also, that there was no reason whatsoever why they should not have filed another notice of appeal when petitioner's motion to amend was later determined on July 25.

The foregoing consideration prevents any successful contention, in this case, that the said common law rule should, because of any exception to that rule, be deemed inapplicable here.

Viewing the situation as of the day when we must view it—that is, as of April 9—respondents then (because of that rule) acquired nothing whatever that they were entitled to keep. Theirs was not then a completed act nor did they, in the circumstances, secure, on that day, any vested right nor were they then even in the position of asserting a right to any conflicting claim. On that day, they moved, as stated, wholly without reason; and the fact that it is now too late for them to appeal cannot operate to allow them to cling to that hasty notice of appeal which, when filed, was (we respectfully submit) completely ineffective on each of the two grounds argued in this Brief.

Now, to hold otherwise, operates to deprive petitioner who pursued—we also respectfully submit—the orderly and lawfully prescribed course of his valuable statutory right to an appeal. He could not have appealed on April 9, or thereafter within the three months, because, to have done so, would have worked an abandonment of his motion to modify.

In other words, on April 9, it would not have been at all important, to the ends of justice, to have disregarded the

said rule of the common law and relieved respondents of the necessity for thereafter filing another notice of appeal. And the fact that they did not, cannot, in the light of that rule, help them any now.

Respondents were advised on July 25 (when petitioner's motion was entertained and overruled in the trial court) that the District Court disagreed with the view that their appeal was valid.

Therefore, we urge that the application of that common law rule itself automatically determines the proper disposition of both of the motions to dismiss the said appeals.

Conclusion

It is, therefore, respectfully contended that this case is one calling for the exercise by this Court of its supervisory powers in order that the rulings of the Court of Appeals, respecting its jurisdiction of said cross-appeal and of said main appeal, may be examined here; and that, to such an end, writs of certiorari should be granted, as prayed, for a review of the said rulings.

Respectfully submitted

S. Mayner Wallace
Petitioner

by
James C. Jones
Lon O. Hocker
Frank Y. Gladney
Joseph H. Grand
Counsel for Petitioner

St. Louis, Mo.
May, 1941

4-663

(2D)

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et als.*
No. 121

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et als.*
No. 122

Petitioner's Motion for Leave to Present a Second Petition for Rehearing or Reconsideration of the Order Denying His Petition for Certiorari as Being Out of Time

ON

PETITION FOR (TWO) WRITS OF CERTIORARI

TO THE

UNITED STATES CIRCUIT COURT OF APPEALS
(EIGHTH CIRCUIT)

Index

Page

Argument (containing new matter and authorities not heretofore cited) 6
Certificate 12
Facts 4
Grounds (for this MOTION) 2
Petition for Rehearing (incorporated by reference) ... 3
Prayer 12
Question 3
Statement 2

Cases Cited

Arnold v. Guimarin & Co., 263 U. S. 427, 434 ..... 9, 10
Bank of Rondout v. Smith, 156 U. S. 330 11
Bruce, Adm'r. v. Tobin, 245 U. S. 18, 19 11
Chicago Great Western R. Co. v. Basham, 249 U. S. 164, 166-167 ..... 8, 9
Collins v. Miller, 252 U. S. 364, 370-371 8
Ex parte Railroad Company, 95 U. S. 221, 225 10
Fiske, et al. v. Wallace, 115 F. (2d) 1003 5
Fiske, et al. v. Wallace, 117 F. (2d) 149 5
McLish v. Roff, 141 U. S. 661, 668 9
Mountain Min. Co. v. St. Louis Min. & Mill. Co., and Mountain Min. Co. v. St. Louis Min. & Mill. Co., 186 U. S. 24, 30-31 9
Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522 8
Reeves v. Beardall, No. 841 of October Term, A. D. 1941 ..... 2, 13
Rochester Telephone Corp. v. United States, 307 U. S. 125, 131 7
Rogers v. Hill, 289 U. S. 582, 588 11
Simmons, John, Co. v. Grier Brothers Company, 258 U. S. 82, 91 11
Winters v. Ethell, 132 U. S. 207, 210 10

Statutes Cited

Federal Rules of Civil Procedure
Rule 52 (b) 2, 4
Rule 59 (a, b & d) 2
Rule 73 (a) 2, 4

"A case may not be brought here in fragments".
(Mr. Justice BRANDEIS in 252 U. S. 521, 522)

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 122

Petitioner's Motion for Leave to Present a Second Petition for Rehearing or Reconsideration of the Order Denying His Petition for Certiorari as Being Out of Time

ON

PETITION FOR (TWO) WRITS OF CERTIORARI

TO THE

UNITED STATES CIRCUIT COURT OF APPEALS
(EIGHTH CIRCUIT)

If Your Honors Please:

Petitioner, S. Mayner Wallace, respectfully submits the above described MOTION upon each of the two grounds below specified.

The Petition for Certiorari presented the proposition (of first impression below and as yet undecided here) whether, under 73 (a) of the FEDERAL RULES OF CIVIL PROCEDURE, notice of an appeal, from a District Court to a Circuit Court of Appeals, may effectually be given within those first 10 days after judgment during which time an adversary party is now accorded the right, by 52 (b) and 59 (a, b & d) of the RULES, to move to modify the judgment or to move for a new trial—in other words, is any such attempt to appeal premature as being from a non-final judgment?

This Court denied certiorari in the view that the application therefor was not made here within the three months provided by law.

The question of the timeliness of that application arose out of the following situation wherein one single case below was considered, piecemeal, by the Court of Appeals:

In November, 1940, that Court decided the above stated proposition under the FEDERAL RULES by denying a motion to dismiss the main appeal and by granting a motion to dismiss a cross appeal in the said case; and, during the same Term, that Court thereafter heard that case on said main appeal and affirmed the judgment under review and, on March 5, 1941, denied a timely petition for a rehearing.

This Petition for Certiorari was then docketed here on June 2, 1941—or within three months from said March 5th.

Petitioner's respectful insistence is that said November orders were both interlocutory and not reviewable here until after the said final judgment in the Court of Appeals.

The Grounds

for this MOTION are these:

1. This Court has just recently granted a writ of certiorari (in No. 841 of the present Term—*Susan G. Reeves, petitioner,* v. *William Beardall, as Ex'or. etc.*—outlined briefly in an APPENDIX, *infra*) to review a ruling in the Court of Appeals for the Fifth Circuit in circumstances

calling for a consideration by this Court of *the same* legal principles that determine this matter of timeliness of petitioner's said Petition for Certiorari—as appears by quotations from opinions of this Court below herein under the following ARGUMENT.

2. That this MOTION is meritorious (as shown by the following ARGUMENT containing some new matter and additional citations) is a respectful conviction of the petitioner, a member of this Bar for nearly 25 years, who is also endeavoring to have some part, albeit modest, in the development of our FEDERAL RULES OF CIVIL PROCEDURE.

For brevity, petitioner's petition for a rehearing, timely filed but denied in an order entered here earlier in the present Term, is now incorporated by reference.

The determinative point is whether the said two November, 1940, orders in the Court of Appeals were final (as this Court seemingly has heretofore assumed) or interlocutory (as the petitioner respectfully contends).

The exact factual situation seems never to have been considered by this Court; but, in the light of the opinions in this Court, below cited, the logic and correctness of petitioner's position are, it is respectfully submitted, sound.

The Question

involved is more specifically stated as follows:

Where an appeal and a cross-appeal, to a Circuit Court of Appeals from a judgment of a District Court, cannot both be jurisdictionally valid (because of the lapse of more than three months between the times of the giving of the notices of same in the trial court) and the Court of Appeals sustains its jurisdiction of the appeal but dismisses the cross-appeal and, later, during the same Term, hears said appeal and affirms said judgment—does the time for certiorari (to review the sustention of said appeal and the dismissal of said cross-appeal) run from the time of the orders thereon or from the time of said final judgment?

Petitioner's respectful insistence is that, upon principle and in the light of the below cited cases in this Court, said orders were, in the recent language of this Court, merely "steps in a proceeding" and purely interlocutory and non-final until the time of said judgment.

(In the circumstances, the validation or the invalidation of either that appeal or that cross-appeal *automatically* invalidated or validated the companion appeal.)

The Facts

[*Same appear, also, in 115 F. (2d) 1003 and 117 F. (2d) 149*]

March 30, 1940, the District Court entered judgment (Rec. 8).

On April 9th (but within the 10 days after judgment) respondents, seemingly pursuant to Rule 73 (a) of the FEDERAL RULES OF CIVIL PROCEDURE, gave notice of their (the main) appeal to the Court of Appeals (R. 9).

Also, on said April 9th (but about 2 hours later in that day) petitioner moved, within the said 10 days, to modify said judgment—in clear accord with Rule 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE (R. 10).

July 25th following, the District Court entertained and denied (R. 12) that motion to modify and then, on July 29th, petitioner gave notice (R. 13) of his (the cross) appeal, from the said judgment, pursuant to said Rule 73 (a).

November 16, 1940, the Court of Appeals denied (R. 20) petitioner's motion to dismiss the main appeal. (The ground of that motion was that, under the said RULES, said appeal was prematurely taken from a non-final judgment.)

Also, on the same day, the Court of Appeals sustained (R. 21) respondents' motion to dismiss the cross-appeal. (The ground of that motion was that that appeal was not

taken within the three months from the entry of said judgment.)

November 27th, following, the Court of Appeals denied a petition for a rehearing of those rulings. Fiske, *et al.* v. Wallace and Wallace v. Fiske, *et al.*, 115 F. (2d) 1003.

Thereafter, on December 6, 1940, the Court of Appeals heard said main appeal and, on January 31, 1941, affirmed said judgment and, on March 5, 1941, denied (R. 57) a timely petition for a hearing of the merits. Fiske, *et al.* v. Wallace, 117 F. (2d) 149.

All of those rulings, in the Court of Appeals, were made and entered during its then November Term.

On June 2, 1941, within 3 months from said March 5, 1941, petitioner docketed here his Petition for (two) writs of certiorari to review the sustention of said main appeal and the dismissal of said cross-appeal.

On October 20, 1941, an order was entered here denying certiorari upon the ground that the same was applied for too late.

Thereafter, on November 10, 1941, petitioner's seasonably filed petition for a rehearing or a reconsideration was denied here.

ARGUMENT

(and Authorities not heretofore cited)

The two rulings of the Court of Appeals, in November, 1940, were both interlocutory; there was no final judgment there until March 5, 1941; and, therefore, it is respectfully urged, the Petition for certiorari, docketed here June 2, 1941, was timely presented—as is demonstrated by the quotations from the authorities in this Court below cited.

In the said circumstances, complete jurisdiction of the entire case was, *ex necessitate*, **retained** by the Court of Appeals until the final hearing, during the same Term, in that Court.

It is clear, of course, that said November order, refusing to dismiss the main appeal, could not have been reviewed until after the final judgment in March of 1941; and it is equally clear that the companion November order, dismissing the cross-appeal, could not sooner have been reviewed because

First, there was only one case below and this Court would not have reviewed the same in fragments or considered one of those November orders without the other since both orders were interdependent and essentially one and completely complementary, and

Secondly, each of those orders was, therefore, interlocutory since the Court of Appeals could have and might have changed its view (concerning its jurisdiction and the validity of those said appeals to it) at the time, during the same Term, of the final judgment in that Court.

The fact that the Court of Appeals, at the end, affirmed, rather than dismissed, the main appeal does not militate against the view that those November orders were interlocutory for, of course, that Court might, finally, have dis-

missed, rather than affirmed, said main appeal—in which event the November order, dismissing the cross-appeal, would have stood *automatically* vacated.

The quality of finality, in what was done in November, must, of course, be viewed as of that time. Finality is not determinable as of any other time. In other words, the element of finality in a judgment is not and cannot be dependent upon what is done later or by the course of future events.

Had this Court first reversed the order dismissing the cross-appeal, the Court of Appeals would, of course, have been in error in later affirming said judgment on the main appeal.

If the Court of Appeals had reversed said judgment and if this Court had sooner reversed the order dismissing the cross-appeal, the Court of Appeals would thereupon have been required to determine an appeal from a judgment that that Court had then already reversed.

Mr. Justice FRANKFURTER, referring, in Rochester Telephone Corp. v. United States, 307 U. S. 125, 131, to "the traditional criteria for bringing judicial action into play," recently emphasized, for the Court,

> "the procedural philosophy pertaining to the Federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of *interim steps in a proceeding.*" (*Italics* ours.)

Mr. Justice BRANDEIS, speaking for the Court, said:

> "Second: A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *(ca. ci.).* And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to **the whole subject-matter and as to all the causes of action** involved. *(ca. ci.).* * * *

"Only **one branch** of the case has been finally disposed of below, therefore none of it is ripe for review by this Court." (**Emphasis** ours.)

Collins v. Miller, 252 U. S. 364, 370-371

And he also wrote:

"A case may not be brought here in fragments. This Court has jurisdiction under sec. 238 of the Judicial Code, as under other sections, only from judgments which are both final and complete. *(ca. ci.)*. The case was not ripe for appeal."

Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522

Mr. Justice PITNEY, speaking for the Court, in a case where a second petition for a rehearing was filed and entertained below, said:

"Sec. 237, Judicial Code, both before and since the amendment of September 6, 1916, permits of the review by this Court only of the final judgment or decree of the highest State court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the State that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the State court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the State the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of a State court susceptible of being reviewed by this Court

would, notwithstanding that duty, be open at the same time to the power of a State court to review and reverse.' "

Chicago Great Western R. Co. v. Basham, 249 U. S. 164, 166-167

This Court, in Mountain Min. Co. v. St. Louis Min. & Mill. Co. (and Same v. Same), 186 U. S. 24, when dismissing two writs of error to a Court of Appeals because of the non-finality of the ruling there, stated (pp. 30-31) that the two records comprised the record in "one and the same case" and held that "part of the case" could not properly be in this Court and in the Court of Appeals at the same time.

Mr. Justice LAMAR, for the Court, wrote:

"The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the Act."

McLish v. Roff, 141 U. S. 661, 668

Mr. Justice SANFORD, for the Court, wrote:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of

error or appeal must be dismissed for want of jurisdiction."

Arnold v. Guimarin & Co., 263 U. S. 427, 434

The test of finality for judgments is, of course, the same in cases in the Courts of Appeal as in the trial courts where there is a cross-appeal or a cross-complaint.

"As we have said in Ayres, et al. v. Carver, et al., 17 How. 591, 'both the original and cross-bill constitute one suit,' and ought to be heard at the same time. Consequently, 'any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and * * * not the subject of an appeal to this court * * *.'"

Ex parte Railroad Company, 95 U. S. 221, 225

"Nor does it make any difference that the decree in the present case dismisses the cross-complaint of the defendants. The filing of the cross-complaint was not the institution of a separate suit, but grew out of the original complaint. There was but a single decree, and that was entitled in the original suit. The right of the defendants to appeal from the decree, so far as their cross-complaint is concerned, will be preserved; and time will run against them, as to all parts of the present judgment of the District Court, only from the time of the entry of a final decree after a hearing under the accounting which is to be had."

Winters v. Ethell, 132 U. S. 207, 210

And a decree by a Circuit Court dismissing a bill in equity as to one defendant who had demurred, leaving the case undisposed of as to other defendants who had answered, does not dispose of the whole case, and is not a

final decree from which an appeal can be taken to this Court.

Bank of Rondout v. Smith, 156 U. S. 330

Certainly this case is not the character of case in which this Court would have taken jurisdiction on certiorari *before* the appellate jurisdiction of the Court of Appeals was exhausted; while it has been positively ruled that a party's omission to apply here for certiorari to review an interlocutory decree cannot be prejudicial to his remedy later in this Court (John Simmons Co. v. Grier Brothers Company, 258 U. S. 82, 91; Rogers v. Hill, 289 U. S. 582, 588).

> "Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916."
>
> Bruce, Adm'r v. Tobin, 245 U. S. 18, 19

The foregoing authorities, in this Court, demonstrate that in these circumstances—

1. No ruling is reviewable here until the same acquires the element of finality—in other words, "interim steps in a proceeding" are not subject to review here prior to final judgment below.

2. A judgment, to be final, must be final as respects all of the phases of controversy involved—"the whole subject matter" and "all the causes of action involved" and "all the parties."

3. When "one branch" of a single case below has not been finally disposed of the case is "not ripe" for review here.

4. No case is reviewable here in "fragments."

5. No case can properly pend in this Court and in a Court of Appeals at the same time.

WHEREFORE, the petitioner, for the reasons aforesaid, prays that this Motion be granted and for a rehearing or reconsideration of the order of this Court denying certiorari as being out of time and that the (two) writs applied for be granted and for all proper relief in the premises; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. MAYNER WALLACE
Petitioner *pro se*

Certificate

The undersigned, S. Mayner Wallace, petitioner above, a member of the Bar of this Court, certifies that, in his opinion, the foregoing Motion is well founded; that the same is not interposed for delay but is presented and filed in good faith because he believes that the same ought to be granted.

S. MAYNER WALLACE
Petitioner *pro se*

APPENDIX

Susan G. Reeves

Petitioner

vs. No. 841 of October Term, 1941

William Beardall, as Ex'or., etc.

Petition for Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted February 9, 1942

In the District Court, petitioner sued respondent in a complaint containing several causes of action.

The trial court entered what purported to be a final judgment against the petitioner on one of those causes of action; and an appeal therefrom was prosecuted by her to the Court of Appeals.

The latter Court dismissed that appeal upon the ground that, since the other causes of action below had not been disposed of, the appealed judgment was not final.

In this Court, the contention is that, under the FEDERAL RULES OF CIVIL PROCEDURE, such a judgment of a trial court is, nevertheless, appealable.

(The RULES have, of course, no application to orders and judgments in a Court of Appeals.)

(29)

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, Petitioner
vs.
Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, Petitioner
vs.
Johanna F. Fiske, *et als.* — No. 122

Petitioner's Motion for Leave to File A Motion to Vacate the Order Denying Certiorari (As Being Out of Time) Upon the Ground That, As Is Shown by the Said Order, This Court Was Mistaken Respecting the Identity of the Judgment Sought to Be Reviewed

S. Mayner Wallace
Petitioner *pro se*

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, Petitioner vs. Johanna F. Fiske, *et als.*		No. 121
S. Mayner Wallace, Petitioner vs. Johanna F. Fiske, *et als.*		No. 122

Petitioner's Motion for Leave to File A Motion to Vacate the Order Denying Certiorari (As Being Out of Time) Upon the Ground That, As Is Shown by the Said Order, This Court Was Mistaken Respecting the Identity of the Judgment Sought to Be Reviewed

May it Please the Court:

Here, there was a Petition for two writs of certiorari to review (in the light of the provisions of the FEDERAL RULES OF CIVIL PROCEDURE) the dismissal of a cross-appeal and, also, the sustention of an appeal, by separate orders on November 16, 1940, in one case, in the United States Circuit Court of Appeals for the Eighth Circuit.

Upon docketing that Petition, the petitioner moved for leave to proceed here upon a shortened record.

On January 31, 1941, during the same Term of the Court of Appeals, the judgment on the merits, then under review there, was affirmed on the said appeal.

Within three months after the denial below (Mar. 5, 1941) of a timely petition for a rehearing of said affirmance, this Petition for certiorari was docketed here—on June 2, 1941.

This Court's order on said Petition, at the present Term, reads as follows:

> "In No. 122, the petition for writ of certiorari to review the judgment entered November 16, 1940, rehearing denied November 27, 1940, is denied on the ground that it was not filed within the time provided by law. 28 USC sec. 350.
>
> "In No. 121, the motion for leave to dispense with the filing and printing of unnecessary portions of the record is denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied."

It is respectfully submitted that the Court, therefore, *mistakenly assumed* that petitioner was seeking to review the said judgment upon the merits (which was in his favor) and, also, to review one (but not both) of the said earlier orders.

The Motion for leave to proceed upon a shortened record applied solely to the application to review both of the said orders—and not to the said judgment upon the merits.

The Petition for certiorari prayed no review of that judgment upon the merits, but did pray a review of both of said orders.

Said judgment was and is material only as fixing the time when both of those orders became final for review here.

Petitioner has heretofore faithfully endeavored in prayers for a rehearing (which are now respectfully incorporated by reference) to present this case, from another and a broader standpoint, to the Court.

It is also respectfully submitted that correction of the error aforesaid will most probably result in the grant of the two writs of certiorari—particularly in the light of the Opinion here, handed down on May 11th instant, in *Susan G. Reeves, petitioner,* vs. *William Beardall, as executor, etc.,* No. 841 of this Term, where (but for the Federal Rules of Civil Procedure) a judgment, of a District Court, would not (because of principles governing the instant case) have been deemed final for appeal.

The vital factor in the instant case was and is whether the time for certiorari ran from November, 1940, or from March, 1941,—whether the said orders in November, 1940, were final or were interlocutory.

Wherefore, the petitioner, for the reason above given, prays that this Motion be granted and for all other proper relief; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. Mayner Wallace
Petitioner *pro se*

St. Louis, Mo.
May, 1942

Certificate

The undersigned, S. Mayner Wallace, petitioner above, a member of the Bar of this Court, certifies that, in his opinion, the foregoing Motion is well founded; that the same is not interposed for delay but is presented and filed in good faith because he believes the same ought to be granted.

S. Mayner Wallace
Petitioner *pro se*